



James L. Pledger
Commissioner

TEXAS

SAVINGS and
LOAN DEPARTMENT

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The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

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Opinion Committee

Dear General Morales:

This letter requests an opinion from your office regarding whether governmental entities organized under the laws of the State of Texas may lawfully deposit funds in the demand accounts of state and federal savings and loan associations and savings banks ("savings associations"). Some prior Attorney General opinions have concluded that savings and loan associations may not qualify as depositories for certain public funds. However, recent changes in federal law in addition to various published federal court opinions have raised questions as to the continuing vitality of those opinions. A current Attorney General's opinion would provide necessary guidance in resolution of these uncertain issues given the dramatic changes in the financial services industry over the past few years.

The following is a brief discussion of relevant law. While such discussion is not exhaustive, a foundation of the predominant relevant issues is outlined for your use and information.

I. STATE LAW

Under Section 104.011 of the Texas Local Government Code (the "Local Government Code"), a municipality organized under the laws of Texas may receive applications from one or more "banks" for the deposit of the municipality's funds (including any school funds of the municipality). Section 105.001 of the Local Government Code defines the term "bank" to mean "a banking corporation or association or an individual banker." Section 116.021 of the Local Government Code authorizes the commissioners court of any county in Texas to contract "with one or more banks in the county for the deposit of the county's public funds" (including money collected or held by a district, county or precinct officer in a county and by the officers of a defined district or subdivision in the county, and by the officers of a defined district or subdivision in the county, and including the funds of a municipal or quasi-municipal subdivision or corporation that has the power to select its own depository but has not done so). Section 116.001 of the Local Government Code defines the term "bank" to mean "a banking corporation or association or an individual banker."

Section 23.74 of the Texas Education Code (the "Education Code") authorizes a public independent school district to deposit funds in a "bank" located in the state of Texas. Section 23.73 of the Education Code defines the term "bank" to include "a state bank authorized and regulated under the laws of the state . . . or a national bank authorized and regulated by federal law," but the term does not include "any bank the deposits of which are not insured by the Federal Deposit Insurance Corporation." Similarly, Section 51.003 of the Education Code states that the governing board of an institution of higher learning may deposit the institution's funds into one or more "depository bank."

The Public Funds Investment Act of 1987 expressly authorizes various public entities (including cities, towns, counties, public school districts, and institutions of higher education) to invest their funds in "certificates of deposits issued by savings and loan associations domiciled in this state..." Tex. Rev. Civ. State, Ann. art. 842a-2. In addition, Section 404.021 of the Texas Government Code states that any savings and loan domiciled in Texas may be designated as a state depository.

II. FEDERAL LAW

Pursuant to 12 U.S.C. §1813(b), the term "savings association" includes state and federal savings and loans as well as federally chartered savings banks. For purposes of analyzing authorized deposit-taking activities, these thrift institutions should be considered collectively.

Under the provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), state and federal thrifts are insured by the Federal Deposit Insurance Corporation. The FDIC also insures the deposits of national and state banks. Federal law also expressly authorizes federal savings associations to accept demand deposits. 12 U.S.C. § 1464(b). As further discussed below, federal regulations promulgated under this law specifically authorize federal savings associations to "accept demand deposits from any person." 12 C.F.R. §545.12. Therefore, under these statutes and regulations, state and federal savings associations are insured by the same entity that insures the deposits of national and state banks and are granted deposit-taking authority equivalent to the authority granted to state and national banks.

Before the enactment of FIRREA, the ability of a federal savings association to accept demand deposits was limited in some situations; prior federal law imposed a requirement that the depositor have some pre-existing business relationship with the depositor. FIRREA altered the deposit-taking authority to permit federal savings associations "to offer checking accounts to any customer." House Comm. on Banking, and Finance and Urban Affairs, Report on Financial Institutions Reform, Recovery and Enforcement Act of 1989, H.R. Rep. No. 101-54, Part 1, 101st Congress, 1st Session, at 344 (May 16, 1989). Pursuant to the authority granted in FIRREA, the Office of Thrift

Supervision amended its regulations to state that federal savings associations "may accept demand deposit accounts from any person." 12 C.F.R. §545.12. The supplementary information provided when this regulation was amended states that the Office of Thrift Supervision intended the new regulation to conform to the provisions of FIRREA modifying the demand deposit-taking authority of federal savings associations, which provision "no longer limits the persons from whom a federal savings association may accept demand deposits." 54 Fed. Reg. 49413 (No. 229, Nov. 30, 1989).

Also relevant in the context of federal law is the "parity provision" of the Texas Savings and Loan Act which provides that state-chartered savings and loan associations may lawfully engage in any activity that is permissible for a federal savings association. Tex. Rev. Civ. Stat. Ann. art. 852a, §5.05. It appears clear that a state-chartered savings and loan, pursuant to this provision, would be permitted to accept demand deposits from any depositor consistent with the powers of a federal savings association granted by those federal laws discussed above.

III. FEDERAL COURT OPINIONS

A current decision of a federal court sitting in Texas recognized that a savings and loan association chartered in Texas is the functional equivalent of a Texas state bank. State of Texas v. Clarke, 690 F.Supp. 573 (W.D. Tex. 1988) ("Clarke"). In Clarke, the specific issue before the court was whether a national bank located in Texas should be permitted to engage in branching to the same extent state savings and loan associations. As part of its analysis the court examined the question of whether a Texas savings and loan association should be viewed as the functional equivalent of a Texas state bank. The court noted that Texas savings and loan associations have the power to receive deposits, make commercial loans, negotiate checks and drafts, and exercise many of the other functions performed by a Texas state bank. The court therefore held that "Texas savings and loans carry on banking business and in doing so function as state banks . . ." 690 F.Supp. at 578; see also Department of Banking and Consumer Finance v. Clarke, 809 F.2d 266 (5th Cir.), cert. denied, 483 U.S. 1010 (1987) (holding that since Mississippi savings associations accept deposits, pay checks, and make loans, such associations are the functional equivalent of a state bank).

V. PRIOR ATTORNEY GENERAL OPINIONS

Some prior opinions of the Texas Attorney General have concluded that savings and loan associations may not qualify as depositories for certain public funds. E.g., Op. Tex. Att'y Gen. No. MW-534 (Dec. 22, 1982); Op. Tex. Att'y Gen. No. MW-272 (Nov. 14, 1980); Op. Tex. Att'y Gen. No. H-1013 (June 9, 1977); Op. Tex. Att'y Gen. No. H-723 (Oct. 20, 1975); Op. Tex. Att'y Gen. No. M'22 (Feb. 10, 1967).

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These opinions were written before the considerable expansion of the powers of savings and loans that occurred after 1982. State and federal savings associations now have the authority to accept demand deposits from any person and are also insured by the Federal Deposit Insurance Corporation, which is the same entity that insures the deposits of national and state banks. Further, these opinions were written before enactment of FIRREA and before publication of various federal court opinions, including Clarke, which should have considerable impact on current legal analysis in this area.

A positive determination permitting local governmental entities to deposit funds in savings associations would be extremely beneficial to those entities particularly in small towns and rural communities. Given the consolidation that has taken place among financial institutions in Texas, the number of institutions available to governmental entities for use as depositories has diminished. Finally, customer services provided by both banks and savings associations have become virtually indistinguishable. A current Attorney General opinion regarding the issues raised in this letter would therefore be beneficial to all parties involved.

Thank you for your consideration. Please contact me if I or my staff can provide any assistance in addressing the matters set forth herein. I look forward to your response.

Sincerely,



James L. Pledger
Commissioner

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